ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.



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| In the Matter of | ) | |
| | ) | |
| DEFINITIONS OF RADIO MARKETS | ) | MM Docket No. 00-244 |
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| | ) | |

To: The Commission

## REPLY COMMENTS

**NASSAU BROADCASTING II, L.L.C.** ("Nassau") hereby submits reply comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned matter. See In the Matter of Definitions of Radio Markets (Notice of Proposed Rulemaking, MM Docket No. 00-244 (released December 13, 2000) (hereinafter "Radio Markets NPRM") and the submissions of other parties in response to the Radio Markets NPRM.[1]

## STATEMENT OF INTEREST

Nassau is licensee of numerous AM and FM radio stations, principally in the Northeastern United States[2] and operates several others pursuant to time brokerage arrangements. Many of stations that Nassau operates and/or owns are located in smaller and medium-sized markets, where the potential impact of the Commission's proposed rule changes is greatest. Nassau has pending several applications for assignment and/or transfer of control of licenses that it filed based upon the existing definitions of radio markets. Nassau, like many other broadcasters, would be greatly injured by any change in Commission rules and policies that might be applied retroactively to pending

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1 Nassau's Reply Comments are timely filed. By Order Extending Time, released January 10, 2001, the Chief of the Mass Media Bureau, acting pursuant to delegated authority, extended the date for reply comments to March 13, 2001.

2 Most of those stations were formerly licensed to Nassau Broadcasting Partners, L.P.

acquisitions and applications. Accordingly, Nassau has an interest in the outcome of this rulemaking proceeding.

## COMMENTS IN REPLY

### *A. Congress Intended To Liberalize Radio Ownership Based Upon the Commission's Existing Definitions of Radio Broadcasting Markets.*

When Congress adopted the Telecommunications Act of 1996,[3] it specifically directed the FCC in Section 202(b) of the Telecom Act to increase the number of stations that could be owned in any market. Certainly Congress did not include in the Telecom Act any changes in the methodology for determining radio markets. Nassau supports the comments by parties who have noted that the failure by Congress to make any such change in the market definitions is persuasive evidence that this is the interpretation intended by Congress.[4]

Further, as noted by parties such as Entravision, the Commission itself interpreted the scope of the directive in Section 202 of the Telecom Act as being "limited to revising our rules as directed by Sections 202(a) and 202(b)(1) of the Telecom Act," rather than a direction to change its radio market definitions and methodology. Order (Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996), 11 FCC Rcd 12368, 12370 (1996).[5]

The Commission's proposed changes have the effect of running against the specific directive of the Congress to liberalize local radio ownership patterns. They should not be adopted. Five years out from the enactment of the Telecom Act, the Commission should not now ignore the directive of the statute but rather should continue to enforce Section 202 of the Telecom Act as adopted by Congress. Telecommunications Research and Action Center v. F.C.C., 836 F.2d 1349, 1361 (D.C. Cir. 1988).

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3 Pub. L. 104-104, 110 Stat. 56 (1996).

4 Comments of Cox Radio, Inc., at p. 3, citing C.F.T.C. v. Schor, 478 U.S. 833, 845 (1986).

### *B. Any Changes In The Commission's Market Definitions Should Be Grandfathered.*

Certainly in the event that the Commission decides to apply new market definitions and methodology, it should only do so in future cases. Nassau agrees with the Commission's tentative conclusion that existing combinations be "grandfathered." Radio Markets NPRM at ¶ 13. Moreover, Nassau supports the suggestion by certain parties such as Viacom that the Commission grandfather not only existing combinations[6] but also pending applications for combinations that might otherwise not comply with the new rules, including all those filed after the adoption of the Radio Markets NPRM, but prior to the effective date of any new rules.[7] To do otherwise would not only violate principles of elementary fairness, but also fundamental principles of administrative law barring retroactive adoption of rules.

By definition, Congress intended that rules and policies adopted in a proceeding such as this NPRM are to have only future effect. The Administrative Procedure Act specifically defines a rules as:

> ... the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy...

5 U.S.C. § 551(4) (emphasis supplied). An agency is further proscribed from making retroactive rules "unless that power is conveyed by Congress in *express terms*" and "[e]ven where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority *absent an express statutory grant*." Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) (emphasis supplied).[8] Where, as here, it is evident that Congress understood the FCC market definition methodology to be the one currently in use, and where in adopting the

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5 Comments of Entravision Holdings, L.L.C., at ¶ 2. See also Comments of NAB at pp. 1-2.

6 See also Clear Channel Comments at p. 5.

7 Viacom Comments, p. 8.

8 See also Bowen, 488 U.S. at 221 (Scalia, J., concurring) ("Adjudication deals with what the law was; rulemaking deals with what the law will be.")

Telecom Act the Congress gave the agency no express statutory authority to change its methodology, the FCC should not now do so retroactively.

### C. *The Commission Cannot Use This Rulemaking To Adopt New Antitrust Policies*

Yesterday, March 12, 2001, the Commission approved many applications for assignment and transfer of radio broadcast licenses that had been "flagged" as a result of concerns expressed by some that grant of such applications would result in excessive concentration of ownership in certain markets.[9] In his Statement accompanying the Public Notice announcing the grants, Chairman Powell acknowledged that in adopting Section 202 of the Telecom Act, Congress had "relaxed the limits the Commission had placed on ownership of radio stations in a local market."[10] Further, he noted, that "Congress established quite plainly the number of stations that could be commonly owned in a local market--- and the proposed transfers in all of the flagged cases comply with theses numerical caps."[11] In his statement, Commissioner Furchtgott-Roth went one step further, noting that "[n]o rules for flagging were ever written; no rules were proposed for public comment; no rules were reviewed by the Commission; no rules were approved by the Commission; no rules were available for parties to review and to understand whether their transaction complied or did not comply with those rules; and no rules were available to challenge in court."[12]

No more than it would be right to impose new market definitions retroactively, Nassau believes that the Commission should not entertain using the instant proceeding set new rules and policies – retroactively or otherwise -- to address the fundamental problem with the "flagging" of applications, i.e., that there are as Commissioner Furchtgott-Roth has noted, no rules or policies in

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9 Public Notice, Broadcast Actions Report No. 44939, released March 12, 2001, pp. 11-24.

10 Chairman Michael Powell (Separate Statement), released March 12, 2001, at p. 1.

11 Id.

12 Statement of Commissioner Harold W. Furchtgott-Roth, "Mass Media Bureau Approval of Various Radio License Transfer Applications," released March 12, 2001.

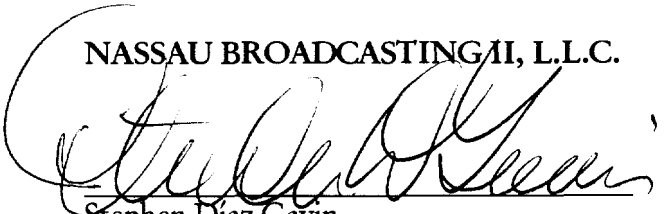
place. The Radio Markets NPRM provided no notice that the scope of this proceeding would be so great or expanded to address market concentration. The failure to provide such notice bars the adoption of rules and policies on market concentration in the absence of additional notice and opportunity for comment. MCI Telecommunications Corp. v. F.C.C., 57 F.3d 1136 (D.C. Cir. 1995) (issue must be adequately framed for interested parties); Reeder v. F.C.C., 865 F.2d 1298 (D.C. Cir. 1989).

### *Conclusion*

When Congress passed Section 202 of the Telecom Act, it intended that the Commission substantially reduce the restrictions on the number of stations one entity could own and control in a market. It was fully aware of how the Commission determined such markets. Five years after the enactment of the Telecom Act, the Commission should not seek to undo the intent of the Congress. The Commission should decline to adopt the rules proposed in the Radio Markets NPRM.

Respectfully submitted,

**NASSAU BROADCASTING II, L.L.C.**



Stephen Díaz Gavin
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037-1350
202-457-6000

Its Attorneys

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